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September 2, 2005

EX PARTE

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Federal Communications Commission
Office of Secretary

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
Room TW B-204
445 12th Street, S.W.
Washington, DC 20554

Re: *In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area* – WC Docket No. 04-223

Dear Ms. Dortch:

Qwest Corporation ("Qwest") herein submits the attached **Ex Parte Memorandum** for consideration in the above-captioned proceeding.

In this **REDACTED** version of the attached **Ex Parte Memorandum** the confidential material on pages 3 and 9 has been blacked out and all pages have been denoted as **REDACTED.** Included are an original and four copies of this letter and the redacted **Ex Parte Memorandum**. The confidential version of the **Ex Parte Memorandum** is being filed today, via hand delivery, under separate cover.

This ex parte is being filed pursuant to 47 C.F.R. § 1.1206(b).

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A fifth copy of this letter is being provided, for which acknowledgment is requested. Please date-stamp the copy and return it to the courier. If you have any questions regarding this submission, please contact the undersigned at the contact information reflected in the letterhead. Thank you for your assistance with this matter.

Sincerely,

Ciaran O'Connell/CJR

Attachment

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EX PARTE MEMORANDUM

DATE: September 2, 2005

RE: Qwest Corporation Petition for Forbearance -- WC Docket No. 04-223, Legal Standards for Forbearance

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The recent (August 12, 2005) ex parte filing by Cox Communications Inc. ("Cox") in the above-captioned docket evidences a very serious misunderstanding of the legal standards to be applied by the Federal Communications Commission ("Commission") when a forbearance petition is filed under Section 10(c) of the Communications Act.

Specifically, Cox contends in its ex parte presentation that Qwest Corporation ("Qwest") has "fail[ed] to demonstrate that it had met the standards for demonstrating [*sic*] that it is entitled to forbearance from the current incumbent LEC [local exchange carrier] regulations that apply to it in the Omaha Metropolitan Statistical Area [MSA]." Cox also contends that Qwest has "made no showing at all that competitive LECs have alternatives to Qwest for Section 251(c) interconnection . . ." While paying lip service to the statutory requirement that a regulation that "'is not necessary'" should be the proper subject of forbearance, Cox nonetheless asserts that, in its view, the Commission can lawfully deny the Qwest forbearance petition unless Qwest affirmatively demonstrates that the rules at issue are of no use whatsoever under any circumstances. Cox compounds this error by confusing the forbearance standards of Section 10 of the Act with the "impairment" standards governed by Sections 251(c)(3) and (d)(2) of the Act, failing to recognize that the two are not at all coterminous.[1] Finally, Cox essentially concedes that all of its arguments are meaningless by agreeing that Qwest has met the test for non-dominant carrier status, a test that is dependent on a finding that Qwest lacks market power in the relevant market.

Under the Section 10(a) test for forbearance, Qwest's forbearance petition is clearly ripe for granting. Qwest has demonstrated (and Cox has conceded) that Qwest is not the dominant provider of common carrier services to the public in the Omaha market and that regulation of Qwest as an incumbent local exchange carrier ("ILEC") is unnecessary and counterproductive.

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[1] Cox contends that the "statutory burden" in this proceeding concerns whether there are ubiquitous unbundled alternatives to Qwest's network.

The dominant carrier is Cox – which is unique in the ferocity of its opposition to this clearly needed regulatory reform, which would force Cox to compete based on the superiority of its own products rather than by leveraging an asymmetrical regulatory scheme to its advantage.[2]

A. Forbearance Petitions Under Section 10(c) Of The Act Must Be Analyzed Pursuant To The Unique Analytical Structure Envisioned By Congress In Section 10.

As Cox's misunderstanding of the Section 10 forbearance standards is fundamental, Qwest takes this opportunity to set forth the proper analytical framework for determining how a forbearance petition should be treated.

A petition for forbearance is not the equivalent of a traditional rulemaking petition that seeks the elimination of an existing rule, in which the petitioner has the same burden as a petitioner seeking adoption of the rule in the first place.[3] Stated very simply, a regulation that is subject to a petition for forbearance may be retained only if the current record would justify adoption of the rule today. And while the petitioning party clearly has the burden of going forward with the initial evidentiary presentation, the mandatory statutory language in Section 10 requires that the Commission grant forbearance unless such a record is established. This results in a totally different analytical framework -- certainly one that bears no relationship to the legal standards governing unbundling under Sections 251(c)(3) and (d)(2) of the Act.[4]

This does not mean that Qwest has not met even the very stringent burden of proof Cox erroneously claims to apply in this proceeding. To the contrary, nothing in the Act even remotely envisions the minority carrier in a market being required to unbundle its network to support the predations of the dominant player. Qwest has conclusively documented on the record that consumers have immediate or near-term options to all of Qwest's services in Omaha, and that the competitive market forces (led by, but by no means exclusive to Cox) that characterize the Omaha market provide protection to Omaha consumers against any predatory or monopolistic behavior by Qwest.[5] Indeed, some of Cox's arguments to the contrary border on the absurd.[6] But

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[2] At one time AT&T Corp. ("AT&T") had joined with Cox in opposing the Qwest forbearance petition. However, AT&T has now withdrawn from this position, essentially conceding that its arguments concerning intermodal competition from cable providers were erroneous.

[3] *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-42 (1983). In *State Farm*, the Supreme Court found that an agency choosing to eliminate a regulation was equally bound to the reasoned decision-making principles that governed adoption of the initial rule. *Id.* at 51-52. In the case of a forbearance petition, in which affirmative action on a petition is mandated by statute and which can be granted simply by inaction, it is obvious that grant of a forbearance petition is not, as is the case with rulemaking petitions, subject to the discretion of the Commission.

[4] *See* Section 10(d) of the Act.

[5] Specifically, Qwest demonstrated that the Omaha MSA's market is extremely competitive and that the demand for local exchange services (or an equivalent) is highly elastic. Qwest faces competition directly with wireline competitive local exchange carriers ("CLECs"), cable

Qwest's factual presentation here does not depend on Cox's untenable position, nor does it establish the minimum showing that Qwest must make to support a forbearance petition in the face of massive competitive entry into a local exchange. To the contrary, Qwest would be entitled to forbearance even with a far lesser evidentiary showing.

Section 10 of the Act is clearly a statutory provision directed towards deregulation and elimination of unnecessary and counterproductive regulations.[7] It does not provide the Commission with the discretion to forbear when it seems like a good idea. The statutory language is mandatory: "the Commission *shall* forbear from applying any regulation or any

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television ("CATV")-based CLECs, commercial mobile radio service ("CMRS") providers and Voice over Internet Protocol ("VoIP") providers. As a result of this competition, Qwest no longer enjoys a dominant market share, and serves less than half of the access lines in the Omaha MSA. It is also the case that Qwest has fully implemented the requirements of Sections 251 and 271 of the Act, and that Qwest is also no longer the sole facilities-based carrier in the Omaha MSA. Based upon these facts, Qwest has established not only that the Omaha MSA's market is competitive, but that this competitiveness is irreversible.

[6] For example, in its August 12, 2005 ex parte, Cox claims that it is dependent on Qwest for interconnection. Cox fails to recognize that its interconnection opportunities with Qwest will be fully preserved under the duty of all LECs to interconnect with each other and to negotiate in good faith the terms of such interconnection. Strangely, Cox also claims that there is an urgent need for "unbundled mass market loops" despite the fact that Cox provides more mass market loops than does Qwest and despite the fact that Cox currently purchases [redacted] of these allegedly vital facilities from Qwest. What is more, these statements are made in the same filing where Cox continues to boast of its status as a "fully facilities-based competitor [that] provides local circuit-switched telephone services to residential and business subscribers in Omaha," including "a well-priced, highly reliable lifeline alternative to the phone services provided by Qwest. . . ." Cox's claims do not make sense.

[7] *See* Conference Report [To accompany S. 652], Telecommunications Act of 1996 (Jan. 31, 1996), 104th Cong., 2d Sess., House of Representatives, Report 104-458, at 184-85. *See also, e.g., In the Matter of Petition for Forbearance of the Independent Telephone & Telecommunications Alliance*, Sixth Memorandum Opinion and Order, 14 FCC Rcd 10840, 10848 ¶ 13 (1999); *In the Matter of Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, Memorandum Opinion and Order, 14 FCC Rcd 16340, 16387 (Separate Statement of Commissioner Michael Powell, Concurring in Part and Dissenting in Part) (1999) ("Thus, instead of waiting for a certain utopian state of competition to arrive (or setting an artificial date on which we think it might be here), I believe we should be using our deregulatory tools, such as forbearance, to *promote* competitive conditions by eliminating rules that are unnecessary [emphasis in original]."); *In the Matter of Personal Communications Industry Association's Broadband Personal Communications Services Alliances' Petition for Forbearance for Broadband Personal Communications Services*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 16857, 16930 (Separate Statement of Chairman William E. Kennard) (1998).

provision of this Act" upon the appropriate findings of the Commission.[8] Two of the three statutory tests for determining whether the Commission is required to grant a forbearance petition are grounded in necessity: whether enforcement of a rule or statutory provision is "necessary" to ensure that rates and practices are just, reasonable and non-discriminatory, and whether enforcement of a rule or statutory provision is "necessary" for the protection of consumers.[9] The third requirement -- that the forbearance be "consistent with the public interest," is a logical application of these two key provisions and is met (from a statutory perspective) upon a showing that "such forbearance will promote competition among providers of telecommunications services."[10] So vital is this pro-competitive impulse driving the forbearance provisions of Section 10 that a forbearance petition shall be "deemed granted" if the Commission does not take action to deny the petition within one year (with a discretionary three-month extension) of the date of filing.[11]

Considerable guidance on how the provisions of Section 10 must be interpreted can be found in two Commission decisions that were affirmed by the D.C. Circuit Court of Appeals. Both of these cases are important because they represented claims that the deregulatory imperatives of Section 10 (and the companion biennial review provisions of Section 11) are far more comprehensive than Qwest claims in its forbearance petition. Read together, these cases establish that the Commission may only retain a regulation that is subject to a forbearance petition if the current record would justify adoption of the regulation today.

In *Cellular Telecommunications & Internet Association v. FCC*,[12] several cellular companies and associations sought forbearance from the number portability rules as they were applied to CMRS providers. The Commission denied the petitions on the finding that forbearance was "not consistent with the protection of consumers" (the second prong of Section 10(a), but using the word "consistent" rather than "necessary"). The petitioning parties appealed, claiming that the language of Section 10(a)(2) mandating grant of a forbearance petition unless the challenged regulation was "necessary for the protection of consumers" was absolute and that no such element of necessity (*i.e.*, "absolutely required") was shown by the Commission's analysis. The Court disagreed, and upheld the Commission's analysis as follows:

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[8] Section 10(a) (emphasis supplied).

[9] Sections 10(a)(1) and (2). Obviously the public interest test can be met by analysis of other factors, but if the Commission finds that competition will be enhanced by grant of the forbearance petition the public interest test is thereby automatically met.

[10] *See* Sections 10(a)(3) and (b). Section 10(c) does not give the Commission a license to deny forbearance petitions on a discretionary basis.

[11] A written explanation of a grant predicated on Commission inaction must follow the grant. *See* Section 10(c).

[12] *See Cellular Telecommunications & Internet Association v. FCC*, 330 F.3d 502 (D.C. Cir. 2003), *pet. for rev. dismissed in part and denied in part.*

> In the forbearance context, . . . it is reasonable to construe "necessary" as referring to the existence of a strong connection between what the agency has done by way of regulation and what the agency permissibly sought to achieve with the disputed regulation. In other words, the number portability rules are required to achieve the desired goal of consumer protection. That is essentially the definition of "necessary" that the Commission embraced and applied in its Order.[13]

In other words, a forbearance petition requires the Commission to determine whether, on the record, the Commission could have adopted the regulation in question and applied it to the petitioning party *ab initio* at the time of action on the petition.

This analytical model is consistent with the approach to similar language in Section 11 of the Act. Section 11(b) of the Act requires the Commission, as part of its biennial review of regulations, to "repeal or modify any regulation it determines to be no longer necessary in the public interest." In *CellCo Partnership v. FCC*,[14] petitioners challenged the Commission's decision not to eliminate certain reporting requirements involving international service and foreign affiliations. These regulations had been under study in one of the Commission's Section 11 review proceedings. The petitioners claimed that the phrase "necessary" in the public interest was absolute, and indeed would require elimination of regulations even though the same regulations could nevertheless be lawfully adopted as "necessary in the public interest" pursuant to the Commission's general rulemaking authority under the Act.[15] In analysis strikingly similar to that in the *Cellular Telecommunications* decision, the Court again agreed that:

> [T]he Commission reasonably interpreted § 11 to require it to "reevaluate regulations in light of current competitive market conditions to see that the conclusion [it] reached in adopting the rule -- that [the rule] was needed to further the public interest -- remains valid."[16]

In other words, could the regulation be adopted today on the basis of the current record?

While obviously the statutory provision examined in *CellCo Partnership* is different than the one examined in *Cellular Telecommunications,* the basic legal principles in both cases are identical. Both Section 10 and Section 11 of the Act have as their primary impetus the elimination of unnecessary and counterproductive regulations. Both are mandatory in that the Commission does not have the discretion to retain unnecessary regulations, even for that period that is customarily afforded to an agency under the discretion envisioned in the Administrative Procedure Act. Indeed, upon a proper record, the Commission does not have the discretion to

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[13] *Id.* at 512.

[14] *CellCo Partnership v. FCC*, 357 F.3d 88 (D.C. Cir. 2004), *pet. for rev. denied.*

[15] *See* Section 201(b) ("[t]he Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this [Act]."). *See also CellCo Partnership*, 357 F.3d at 96.

[16] *CellCo Partnership*, 357 F.3d at 98.

retain a regulation (or to continue to enforce any provision of the Act) -- a fact underscored by the Commission's ability to grant a forbearance petition through inaction, while providing a written explanation of its decision at a date after the effective date of the forbearance grant.[17]

This statutory structure has several significant implications:

- There is no requirement that a petitioning party affirmatively "prove" that the tests for forbearance have been met. While the petitioning party must obviously come forward with sufficient evidence to permit the Commission to draw a reasonable conclusion on these tests, this evidentiary requirement is considerably less than the burden of proof that Cox would apparently place upon a party seeking forbearance. Upon a proper *prima facie* case by a petitioning party, the "burden" of proving that a particular regulation should be retained must be on those desiring its retention.

- The basic test for whether a forbearance petition should be granted is whether the record in the forbearance proceeding would justify adopting the rule today.

- The fundamental impulse of Section 10 is deregulatory, and the Act has an inherent bias towards deregulation.[18]

- Once the findings specified in Sections 10(a) and (b) have been made, forbearance is mandatory, not discretionary.

Perhaps the issue can be most starkly presented by means of a simple question: would Congress, in enacting the unbundling provisions of Section 251(c) of the Act, have intended that they apply to the minority telecommunications provider in a market to the sole and artificial benefit of the majority provider? The answer is clearly no.

B. Cox's Concession That Qwest Is A Non-Dominant Carrier In Omaha Is Inconsistent With Every Other Argument That Cox Has Put Forth In This Proceeding, And Demonstrates Just How Frivolous Cox's Position Is.

It is clear that the legal standards for non-dominant carrier status are more rigorous than are the standards for forbearance, even if the facilities and services involved are identical.[19] This is not surprising, as the test for non-dominance requires an affirmative finding that the carrier lacks

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[17] That is, if the Commission simply declines to act on a forbearance petition, it takes effect as if affirmatively granted by the Commission. *See* Section 10(c).

[18] *See In the Matter of Petition of SBC Communications Inc. for Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services*, Memorandum Opinion and Order, 20 FCC Rcd 9361, 9364-65 ¶ 9 (2005), *pet. for rev. filed* June 6, 2005, Case No. 05-1186 (D.C. Cir.).

[19] *See AT&T v. FCC*, 236 F.3d 729, 737-38 (D.C. Cir. 2001).

market power in the relevant market.[20] While Qwest has shown that it lacks market power in Omaha and has requested non-dominant status for its interstate access services, a showing of non-dominance is not necessary to a grant of Qwest's forbearance petition. Indeed, since the standard for determining non-dominance is tougher than that for forbearance, it is logical that if Qwest is declared to lack market power in Omaha (the *sine qua non* for non-dominant classification), it is clearly entitled to forbearance.

In a remarkable concession, Cox has conceded that Qwest lacks market power in the retail marketplace. Cox agrees in its August 12, 2005 ex parte presentation that Qwest is entitled to non-dominant classification of its retail services in Omaha, thereby conceding that Qwest does not have retail market power in Omaha:

> **Cox does not oppose nondominant treatment for Qwest.** Granting nondominant status would be consistent with the Commission's actions in proceedings involving other carriers and consistent with Qwest's evidence concerning retail market share. Nondominant status would reflect Qwest's place in the retail marketplace.

Presumably, Cox believes that this concession has no impact on the Qwest forbearance petition because Cox believes that it is entitled to obtain Qwest services and facilities based on Qwest's ILEC status in the wholesale marketplace, even though Qwest ultimately lacks retail market power.

Cox's position here points out the astonishing contradiction inherent in the entire prospect of the truly dominant carrier in a market (Cox) fighting desperately for the right to predate on the minority provider. Clearly Section 10 is focused on consumer protection, and Cox's concession that consumers are adequately protected by competition and the market leaves Cox without any argument that its claim to Qwest's facilities takes priority over consumer protection.

Simply stated, Cox's agreement that Qwest lacks market power in the retail market in Omaha is tantamount to agreement that the Qwest forbearance petition should be granted. The concession can be read no other way.

C. Qwest's Petition Clearly Meets The Statutory Forbearance Standards.

The statutory standards for forbearance are straightforward, and the Qwest forbearance petition easily meets each of them.

Section 10(a)(1): Enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that

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[20] *See In the Matter of Motion for AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271, 3274 ¶ 4 (1995). The Commission "distinguished two kinds of carriers -- those with market power (dominant carriers) and those without market power (non-dominant carriers)."

telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory. The market forces described in Qwest's forbearance petition make it obvious that unjust or unreasonable rates or practices or unjust or unreasonable discrimination is, as a practical matter, not economically feasible or rational. If Qwest were to attempt to engage in predatory practices from its current market position in Omaha, it would obviously drive its customers away because it does not have the market power necessary to engage in such practices. Qwest does not claim that every single customer in Omaha has an immediate choice of carrier. That situation may never come about and clearly is not the legal test for forbearance.[21] But the Omaha market is so competitive that anti-competitive conduct by Qwest would be economically irrational.[22] Cox has presented no evidence to the contrary, neither has any other opposing party.[23] As there is no reason to suspect that Qwest would engage in irrational economic behavior,[24] Qwest has met this prong of the forbearance test.

In this regard, it is important to note that the forbearance requested by Qwest would not mean that Qwest is totally deregulated or that unjust, unreasonable or discriminatory practices would become the norm for Qwest. To the contrary, after forbearance, Qwest will still be subject to the provisions of Sections 201(a) and 202(a) of the Act, making such practices unlawful. Qwest detailed some of the more salient regulations that will remain after forbearance in its July 25, 2005 ex parte memorandum on the subject.[25] The point is that Qwest is simply requesting that the same regulations be applied equally to the services and facilities of both Qwest and Cox.

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[21] Although in a very real sense, the availability of wireless alternatives does give every Omaha customer a choice of carrier, a choice which is available on an immediate basis.

[22] *See* Qwest forbearance petition at Exhibit B, Affidavit of John Haring, Jeffrey H. Rohlfs and Harry M. Shooshan III, Strategic Policy Research at 15-16. *Also see* Phillip E. Areeda & Herbert J. Hovenkamp, Antitrust Law ¶ 723 (1996).

[23] Qwest finds it ironic that Cox -- the dominant carrier in the Omaha MSA -- makes no mention of the rates and terms contained in its own commercial interconnection agreements with other parties. If Cox believes that permitting Qwest to engage in negotiated commercial agreements on an equal footing would lead to "unjust" or "unreasonable" or "discriminatory" practices, Qwest suggests that Cox submit its own rates and practices to the record in order to show the terms that prevail in the competitive market.

[24] Phillip E. Areeda & Herbert J. Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 113 (2000) ("As a general proposition business firms are (or must be assumed to be) profit maximizers"); *see also* Illustrating a Behaviorally Informed Approach to Antitrust Law: The Case of Predatory Pricing, by Avishalom Tor, 18 Antitrust ABA 52 (Fall 2003) ("One of the core assumptions of the traditional economic approach to antitrust law is that competitors are perfectly rational, profit-maximizing, decision makers.").

[25] The analysis in that presentation dealt with the regulatory environment after grant of the Qwest forbearance petition, and included a conclusion that Qwest's interstate special access services will continue to be offered pursuant to tariff. Qwest has also requested non-dominant status for its interstate special access services. If Qwest's interstate special access services were to be declared non-dominant, the requirement that they be tariffed would be eliminated.

Section 10(a)(2): Enforcement of such regulation or provision is not necessary for the protection of consumers. As Cox and others opposing Qwest's forbearance petition focus almost entirely on protecting their own regulatory interests, there is no serious dispute that the rules from which Qwest seeks forbearance are not necessary for the protection of consumers. In fact, Cox claims to a large extent that Qwest's evidence unduly focuses on protection of consumers rather than protection of Cox, seeming to concede that Qwest meets this statutory test. There is no question that the regulations from which Qwest seeks forbearance are not "necessary" to protect the interests of consumers.[26]

Section 10(a)(3): Forbearance from applying such provision or regulation is consistent with the public interest. It is on this part of the forbearance test that Cox seems to focus. Because this part of the test is automatically met if the Commission finds that "such forbearance will promote competition among providers of telecommunications services,"[27] Cox seems to contend that Section 10 forbearance is really another way of looking at the impairment requirements of Section 251(d)(2). Thus, without really focusing at all on the benefits to the public and to competition that will be brought about by grant of Qwest's forbearance petition, Cox simply relies on how much easier and cheaper it might be for Cox to obtain regulated access to some of Qwest's facilities at regulated rates than it would be for Cox to actually compete in the marketplace. This desire of Cox to purchase Qwest's facilities at rock-bottom prices is clearly not sufficient in opposing a forbearance petition. Cox's private interests cannot override the interest of the consuming public. The law is very clear -- if the public is given an array of competitive choices through a variety of providers, Qwest is entitled to forbearance.

Of course, Cox has made no such demonstration, and its arguments of its "need" for Qwest's facilities are never bolstered by anything more than increasingly shrill and decreasingly rational rhetoric. Cox's insistence on its desperate need for unbundled loops despite the fact that it has never purchased an unbundled loop, its claim that it serves "only" 18 of the 24 wire centers identified by Qwest without providing any explanation of why it does not, cannot or will not serve a greater footprint, and its claim that "over [redacted] percent of all of Cox's traffic to other carriers goes through its collocation facilities with Qwest" without even attempting to explain why routing this traffic differently would be impossible or impracticable (or why this traffic is really local exchange traffic or exchange access traffic at all, rather than transit traffic), highlight that Cox really has no intelligible argument. This is not surprising, as Cox, the dominant market player in Omaha, is seeking to impose (retain) dominant carrier regulations on its chief competitor, a situation which would be laughable were it not serious.

The record here reflects with some clarity how competition in Omaha will be enhanced and encouraged by grant of Qwest's forbearance petition. Cox has contended strongly that it intends to provide service to all of Omaha, but prefers to do so at times with Qwest's facilities rather

[26] Cox's concession (*see* above) that Qwest is not a dominant carrier in the Omaha retail market is likewise conclusive on this point.

[27] Section 10(b).

than with its own facilities. By itself, this is fine -- Qwest has in the past proven itself willing to deal with other carriers on a wholesale basis at freely negotiated terms and conditions, and will continue to do so (in addition to the regulatory imperatives that remain after grant of Qwest's forbearance petition).[28]

What Qwest objects to, and what Cox insists on, is the ability of Cox to substitute Qwest's facilities where the market would not dictate their use, and instead to obtain such access solely by virtue of regulatory imperative. There is no showing that Cox is financially unable to construct its own facilities anywhere it finds Qwest's market offerings unattractive. Whenever Cox chooses to do so (*i.e.*, construct its own facilities because of market advantage), competition is enhanced. The same is true for other competitors. What Cox seeks -- relief from construction of its own facilities even where it is economically rational and intelligent to construct them -- is *per se* anti-competitive.[29]

Again, Qwest must turn to the premise of Section 10 of the Act. In today's environment, if the Commission were starting from scratch in determining how to regulate the carriers and others providing telecommunications services and telecommunications in Omaha, would it ever select the structure postulated by Cox? Again, the answer is clearly no.

D. Conclusion. Qwest's Forbearance Petition Clearly Meets The Standards For Forbearance Under Section 10 Of The Act.

Qwest submits that its petition for forbearance not only meets the standards for forbearance under Section 10 of the Act, but that this petition falls comfortably within the boundaries of forbearance petitions that "shall" be granted by the Commission. The Section 251(c) rules from which Qwest seeks forbearance would never have been imposed on an entity in Qwest's market position in Omaha had the current situation existed in 1996. Under the statutory imperative of Section 10, Qwest is entitled to a grant of its petition and forbearance from those Section 251(c) rules identified in this proceeding.[30]

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[28] The most significant of these are the market-based Qwest Platform Plus service and Qwest's market-based line sharing agreements.

[29] Indeed, it is now well established that allowing carriers to purchase UNEs at TELRIC prices beyond conditions of natural monopoly can often discourage competition by suppressing the economic incentive for a carrier to construct its own facilities. *See, e.g., United States Telecom Association v. FCC*, 290 F.3d 415, 424-26 (D.C. Cir. 2002), *reh'g denied en banc* (No. 00-1012, Sept. 4, 2002), *cert. denied sub nom., WorldCom, Inc. v. United States Telecom Association*, 538 U.S. 940, 123 S. Ct. 1571 (2003).

[30] *See* Qwest ex parte, filed June 16, 2005, WC Docket No. 04-223 at 5. *Also see*, Qwest forbearance petition at 22-31, 31-32 and 38-39 for a catalog of the rules covered by this request.